

Florida State University College of Law Scholarship Repository

Scholarly Publications

Spring 2011

Disgust and the Problematic Politics of Similarity

Courtney Megan Cahill

Florida State University College of Law

Follow this and additional works at: <https://ir.law.fsu.edu/articles>



Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Law and Politics Commons](#), [Law and Society Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

Courtney Megan Cahill, *Disgust and the Problematic Politics of Similarity*, 109 MICH. L. REV. 943 (2011),
Available at: <https://ir.law.fsu.edu/articles/524>

This Book Review is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Scholarly Publications by an authorized administrator of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.

DISGUST AND THE PROBLEMATIC POLITICS OF SIMILARITY

Courtney Megan Cahill*

FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION & CONSTITUTIONAL LAW. By *Martha C. Nussbaum*. Oxford and New York: Oxford University Press. 2010. Pp. xxiv, 217. \$21.95.

INTRODUCTION

Martha Nussbaum's latest book, *From Disgust to Humanity: Sexual Orientation & Constitutional Law*,¹ could not have come at a more opportune time in the history of gay rights in the United States. All signs point to progress toward "humanity," from same-sex couples' successful bids for marriage equality in a handful of states² to the public's increasing acceptance of the prospect of gays and lesbians serving openly in the military.³ Even if recent cognitive science research indicates that same-sex relationships provoke more than a little disgust in some people,⁴ landmark marriage-equality victories in a few states suggest that the law is far less willing to tolerate that disgust as a valid basis for discriminatory and exclusionary legislation.⁵ And unlike its culture-war comrade abortion, homosexuality has become less, not more, taboo over time.⁶ Whereas abortion is rarely, if at all, mentioned on

* Visiting Associate Professor of Political Science, Brown University; Professor of Law, Roger Williams University School of Law; J.D., Yale Law School; Ph.D., Princeton University; B.A., Columbia University.

1. Ernst Freund Distinguished Service Professor of Law and Ethics, University of Chicago.
2. Five states and one district now recognize marriage equality for same-sex couples, three by legislative enactment alone (New Hampshire, Vermont, and Washington, D.C.) and three by judicial mandate (Massachusetts, Connecticut, and Iowa). One state, California, recognizes same-sex marriages that were entered into in California before Proposition 8 was passed in November 2008, but does not recognize any marriages between same-sex couples that were entered into after that time.
3. See Carl Hulse, *Senate Repeals Ban Against Openly Gay Military Personnel*, N.Y. TIMES, Dec. 19, 2010, at A1; Dalia Sussman, *New Poll Shows Support for Repeal of 'Don't Ask, Don't Tell'*, N.Y. TIMES THE CAUCUS (Feb. 11, 2010, 1:58 PM), <http://thecaucus.blogs.nytimes.com/2010/02/11/new-poll-shows-support-for-repeal-of-don-t-ask-don-t-tell/>.
4. See Yoel Inbar et al., *Disgust Sensitivity Predicts Intuitive Disapproval of Gays*, 9 EMOTION 435 (2009).
5. See, e.g., *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 445 (Conn. 2008) (recognizing that "visceral prejudice" is one reason why gays and lesbians constitute a quasi-suspect class under the Connecticut Constitution).
6. See Hadley Freeman, *Abortion is the one taboo left in the world of comedy: Why Family Guy has offended everyone*, GUARDIAN (U.K.), Aug. 19, 2009, available at <http://www.guardian.co.uk/commentisfree/2009/aug/19/family-guy-abortion-hadley-freeman> (discussing the Fox network's refusal to run a *Family Guy* episode in which a female character considers getting an abortion).

television,⁷ homosexuality, as Nussbaum points out, is becoming a virtual regular on primetime (p. xviii). Indeed, if the gay couple on ABC's *Modern Family* is any indication, homosexuality—or at least a very domesticated version of it—has begun to lose its taint.

In documenting this progressive movement from a “politics of disgust” to a “politics of humanity” (pp. xvii–xviii), Nussbaum’s book tends to mimic it, starting at the low point of sodomy’s criminalization in American law (Chapter Three); moving toward the significantly higher points of *Romer v. Evans*,⁸ *Lawrence v. Texas*,⁹ and the marriage-equality movement (Chapter Five); and ending with a gesture toward a world “after disgust,” one in which “progress . . . is . . . complete” (p. 208). To reach this post-disgust zenith, Nussbaum maintains that we must exercise not only our respect for others but also our imagination, the latter of which she defines as the capacity to “participat[e] in the lives of others” (p. xix), to identify with the situation of another “and see it as relevantly similar” (p. 48) to one’s own, and to “see the other as a center of perception, emotion, and reason, rather than an inert object” (p. xix). “The politics of humanity includes,” she asserts, “both respect and imagination, and imagination understood as an ingredient essential to respect itself” (p. xix). In this, Nussbaum weds her more recent work on sexuality and disgust¹⁰ with her earlier work on literature and the literary imagination.¹¹ The “literary imagination,” which Nussbaum wrote of fifteen years earlier, is “an essential part of both the theory and the practice of citizenship”¹² because it “asks us to concern ourselves with the good of other people whose lives are distant from our own.”¹³ There, Nussbaum was concerned with the imagination’s relevance “to public thinking”¹⁴ and to good citizenship in general. Here, she is concerned with the imagination’s ability to facilitate a movement from disgust to humanity in the area of gay rights generally and American law in particular.

From Disgust to Humanity is novel not because it elucidates the role that disgust has played in the law. To be sure, the book’s survey of law and disgust draws from the richly developed theoretical framework of disgust that

7. See Kate Aurthur, *Television’s Most Persistent Taboo*, N.Y. TIMES, July 18, 2004, § 2, at 27 (“Unlike such once-taboo issues as date rape, gay relationships and teenage sex, abortion on television remains an aberration.”).

8. P. 95; 517 U.S. 620 (1996).

9. P. 85; 539 U.S. 558 (2003).

10. See MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* (2004) [hereinafter NUSSBAUM, *HIDING FROM HUMANITY*]; Martha C. Nussbaum, “*Secret Sewers of Vice*: Disgust, Bodies, and the Law,” in *THE PASSIONS OF LAW* 19 (Susan A. Bandes ed., 1999) [hereinafter Nussbaum, “*Secret Sewers*”].

11. See MARTHA C. NUSSBAUM, *CULTIVATING HUMANITY: A CLASSICAL DEFENSE OF REFORM IN LIBERAL EDUCATION* (1997) [hereinafter NUSSBAUM, *CULTIVATING HUMANITY*]; MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* (1995) [hereinafter NUSSBAUM, *POETIC JUSTICE*].

12. NUSSBAUM, *POETIC JUSTICE*, *supra* note 11, at 52.

13. *Id.* at xvi.

14. *Id.* at 5.

antecedes it.¹⁵ Rather, what is new here is Nussbaum's recommended antidote to disgust. Unlike other theorists of disgust, Nussbaum offers not just a theory of what it is, but also, and perhaps more importantly, a way to get past it.¹⁶ That way, she posits, is the politics of humanity, which involves the exercise of one's imagination and the simultaneous cultivation of similarity between one and the so-called disgusting other. If the politics of disgust is all about separation and recoiling from those who disgust you, then the politics of humanity is all about association and trying to walk in those persons' shoes for a while—and, in the process, seeing them as people who are in some sense "like oneself."¹⁷

Nussbaum deserves praise for setting forth a possible solution or cure to disgust's dominion in the realm of sexual orientation and the law. Let's call that solution or cure the *politics of similarity*. At the same time, however, this solution, or at least a strong version of it, suffers from two potential shortcomings, one descriptive and the other normative.

First, humanity-through-similarity might lead to descriptive imprecision. Take, for instance, the push for marriage equality by same-sex couples. In that context, a strong version of Nussbaumian similarity is already well underway, as advocates have attempted to cast same-sex couples who desire to marry as "just like" their married heterosexual counterparts in order to gain the marriage right.¹⁸ While these kinds of "like-straight" arguments might make sense on a doctrinal level, motivated as they are by the equality principle and its antecedent philosophical tradition,¹⁹ they tend to distort the measurable differences that social scientists have found to exist between same-sex and cross-sex intimate and family structures.²⁰ Indeed, by embracing such a vigorous account of similarity politics, marriage-equality advocacy has not just minimized difference but erased it entirely.

15. See generally WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* (1997); NUSSBAUM, *HIDING FROM HUMANITY*, *supra* note 10; Nussbaum, "Secret Sewers", *supra* note 10; Paul Rozin et al., *Disgust*, in *HANDBOOK OF EMOTIONS* 637 (Michael Lewis & Jeannette M. Haviland-Jones eds., 2d ed. 2000).

16. Assuming, of course, that we even want or are able to. Some commentators, liberal and conservative alike, maintain that disgust is a valid basis for lawmaking. See, e.g., Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621 (1998) (reviewing Miller's book and making the liberal argument for disgust); Leon R. Kass, *The Wisdom of Repugnance: Why we should ban the cloning of humans*, NEW REPUBLIC, June 2, 1997, at 17 (making the conservative argument for disgust). Others are less "sanguine" about the possibility of moving past disgust in the context of sexual orientation and the law. See, e.g., Mary Anne Case, *A Lot to Ask: Review Essay of Martha Nussbaum's From Disgust to Humanity: Sexual Orientation and Constitutional Law*, 19 COLUM. J. GENDER & L. 89, 94 (2010).

17. P. 48. Here, Nussbaum advocates the application of Roger Williams's vision of religious equality, which understands each individual as "a person like oneself, struggling with difficult problems in a confusing world," to the context of sexuality and the law. P. 48.

18. See, e.g., Marc Spindelman, *Homosexuality's Horizon*, 54 EMORY L.J. 1361 (2005) (discussing, *inter alia*, the "like-straight" arguments that have driven marriage-equality advocacy).

19. See, e.g., *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (noting, in the context of assisted suicide, that "[the Equal Protection Clause] embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly").

20. See *infra* Section II.B.1.

Second and more normatively, humanity-through-similarity does very little to advance a thick notion of cultural, social, and marital pluralism. It is, in short, not all that imaginative, if by imagination we understand the creative ability to imagine and respect worlds that are different from our own.²¹ In prior work, Nussbaum argued that “part of the idea of flourishing is a *deep respect for qualitative difference*.”²² Here, however, difference takes a backseat to similarity. As such, the reader is left wondering whether Nussbaum’s vision of sexual orientation and the law can accommodate the same sort of difference that she has championed elsewhere. More generally, at the end of this book one wonders whether actors are capable of moving past disgust for marginalized out-groups by imagining and “deeply respecting” even those differences that provoke discomfort. If not, then what we are left with is a somewhat thin conception of social and cultural pluralism in American law.

Part I provides an overview of *From Disgust to Humanity*, including Nussbaum’s theory of the imaginative vision and the role that it might play in facilitating a movement away from disgust and toward humanity. Part II then critiques that vision and the politics of similarity on which it rests from both a descriptive and a normative perspective. This Part uses marriage-equality advocacy as an example of a movement that has adopted a strong version of Nussbaum’s politics of similarity, one that fails to capture the meaningful differences that exist between gay relationships and their cross-sex counterparts. Part III finally considers an alternative way to move past disgust and toward humanity for out-groups generally, one that focuses less on similarity and more on difference; or, in words written by Nussbaum fifteen years ago, one that “attend[s] to citizens in all their concreteness and variety.”²³ That way draws from aspects of the Supreme Court’s sex equality jurisprudence, which, far from retreating from difference, has wholeheartedly embraced it.

I. FROM DISGUST TO HUMANITY: A NARRATIVE OF PROGRESS

The law loves progress narratives. “The history of our Constitution,” Justice Ginsburg intoned in *United States v. Virginia*, “is the story of the extension of constitutional rights and protections to people once ignored or excluded.”²⁴ While such progress narratives might very well be, according to their skeptics, “progress myths” or even “phony history,”²⁵ they are neverthe-

21. See NORTHROP FRYE, *THE EDUCATED IMAGINATION* 96 (1964) (“The world of literature is a world where there is no reality except that of the human imagination. We see a great deal in it that reminds us vividly of the life we know. *But in that very vividness there’s something unreal.*”) (emphasis added).

22. NUSSBAUM, *POETIC JUSTICE*, *supra* note 11, at 45 (emphasis added).

23. *Id.*

24. 518 U.S. 515, 557 (1996).

25. FRYE, *supra* note 21, at 145 (“Progress myths come into all the phony history that people use when they say that someone is a ‘Puritan,’ meaning that he’s a prude, or that someone else is ‘medieval’ or ‘mid-Victorian,’ meaning that he’s old-fashioned.”).

less extremely seductive for those legal actors who aspire to read legal history as reflecting an ascent from relative benightedness to relative enlightenment.²⁶

Nowhere is this tendency to read social and constitutional history in progressive terms more pronounced, at least right now, than in the context of civil rights for sexual minorities. For instance, courts that have struck down exclusionary marriage laws on state constitutional grounds have invoked narratives of progress that variously conceptualize marriage and the legal status of gays and lesbians as evolving steadily over time.²⁷ Similarly, certain champions of marriage equality have conceptualized marriage as the only institution that will complete gays and lesbians' progress in the law from outlaw to in-law. As William Eskridge has argued, "As a formal matter, law's civilizing movement will not be complete until the same-sex married couple replaces the outlawed sodomite as the paradigmatic application of law to gay people."²⁸

In the spirit of such progress, *From Disgust to Humanity* tends to embrace a narrative of advancement for gays and lesbians in American law on both a descriptive and a normative level; indeed, the title alone (*from . . . to*) invites the reader to consider the relationship between sexual orientation and constitutional law within a progressive frame. On a descriptive level, Nussbaum outlines the progress that sexual minorities have in fact made in the law from disgust-provoking outlaws to (relatively) accepted legal subjects. After setting forth, respectively, the politics of disgust and the politics of humanity in Chapters One and Two, Nussbaum traces in the next three chapters what appears to be an ascensional movement, one that starts with the criminalization of sodomy before *Lawrence v. Texas* in Chapter Three (pp. 54–93), progresses toward the Supreme Court's rejection of disgust politics in *Romer v. Evans* in Chapter Four (pp. 94–125), and apparently culminates with some recent marriage-equality victories in Chapter Five—victories that suggest that at least in some states, the politics of humanity has triumphed (pp. 126–66).

It is important here to note that Nussbaum is judiciously realistic about the legal progress that gays and lesbians both have made and will continue to make moving forward; as such, she avoids giving "the impression that all past history was a kind of bad dream, which in these enlightened days we've shaken off."²⁹ For instance, in the sixth and final chapter, Nussbaum documents the legal domains in which "the politics of disgust is alive and

26. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) ("As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.").

27. See, e.g., *Varnum v. Brien*, No. CV5965, 2007 WL 2468667, ¶ 96 (Iowa Dist. Ct. Aug. 30, 2007) (stating that "[m]arriage has evolved over time" to become a more democratic institution); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 966–67 (Mass. 2003) (referring to marriage as "an evolving paradigm").

28. WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 8 (1996).

29. FRYE, *supra* note 21, at 145.

well,”³⁰ if not “on a rampage” (p. 208), even after marriage-equality victories in some states. In so doing, she challenges, if only implicitly, Eskridge’s assertion that with marriage gays and lesbians’ progress from outlaw to in-law is “complete.”³¹ In addition, Nussbaum’s concluding chapter is provocatively entitled “After Disgust?,” thus inviting skepticism over whether moving past disgust is, in fact, possible.³²

On a more normative level, Nussbaum argues that the law should aspire to move past disgust, and she provides a way that it might do so. Thus, even as she is cautiously optimistic about whether we can move past disgust entirely, Nussbaum is more than certain that we should.³³ She suggests that one way to do so is to put ourselves in the so-called disgusting other’s shoes and to see the similarities between her world and our own. This Review, as previously noted, refers to Nussbaum’s antidote to disgust as the “politics of similarity.” Before elaborating on that antidote, though, Nussbaum first explains in greater depth what she means by the politics of disgust in Chapter One. The politics of disgust, she there argues, “involves a double fantasy: a fantasy of the dirtiness of the other and a fantasy of one’s own purity” (p. 17). “Both sides of the projection involve false belief” (p. 17), she continues, “and both conduce to a politics of hierarchy” (p. 17). For Nussbaum, disgust is so conducive to a “politics of subordination” (p. 18) that it can almost never constitute a valid basis for legal regulation, even if that regulation also rests on morally and constitutionally defensible rationales. She says, “We cannot conclude that a policy is wrong simply because it is backed by a rhetoric of disgust: for there may be other better reasons in its favor. Disgust, however, often prevents us from looking for those good reasons” (p. 20). Consequently, “[t]urning to [disgust] to legitimize policies that can be defended in other ways is . . . dangerous” (p. 20).

By contrast, the politics of humanity, Nussbaum contends in Chapter Two, is one of equal respect and antisubordination, the latter of which is “an idea . . . that stretches back to the nation’s founding” (p. 43). To cultivate a politics of humanity, Nussbaum argues that we must exercise our imagination: “[W]ithout the ability to imagine the situation of a person in a different social group and to assess it from that person’s point of view,” she observes, true understanding and “equal respect cannot come into being” (p. 47).

30. P. 169. Those domains include “America’s legal and political dealings with sex businesses, bathhouses, and the like,” which have been subject to disgust-based regulation in the form of public nuisance law. P. 169. Nussbaum notes that while such domains “do not concern same-sex actors only,” such “actors . . . face a heightened level of surveillance and disgust-anxiety, as the intense focus on gay bathhouses reveals.” P. 169.

31. Unlike Eskridge, Nussbaum questions whether marriage *qua* marriage is the only way to gain access to civil rights. P. 132.

32. That said, in the conclusion to *From Disgust to Humanity* Nussbaum does suggest that moving past disgust permanently is possible when she states that “[l]aw needs to do a lot more work before the progress that is underway in this area will be anything like complete.” P. 208 (emphasis added).

33. See also Nussbaum, “Secret Sewers,” *supra* note 10, at 22 (“[T]he specific cognitive content of disgust makes it always of dubious reliability in social life, but especially in the life of the law.”).

However interesting, it is here where Nussbaum's theory of humanity-inducing politics becomes a bit unclear.

On the one hand, Nussbaum argues in some places that a politics of humanity flows both from assessing the situation of a person "from that person's point of view" (p. 47) and from "an honest confrontation with the real lives of the group and its members" (p. 123). In this sense, humanity is achieved by understanding the world of the so-called disgusting other *through that person's eyes* rather than necessarily *through our own*. If that is the case, then the theory of imaginative vision that Nussbaum articulates calls to mind her theory of the novel in *Poetic Justice*. In that prior work, Nussbaum maintains that the beauty and power of the novel partly resides in its ability to capture the "qualitative differences"³⁴ (between and among individuals) as well as "the separateness of persons."³⁵ To be sure, the novel, through its attention to particularity, understands that "part of the idea of [human] flourishing is a deep respect for qualitative difference."³⁶ "Government," Nussbaum there argues, should "acknowledge the separateness, freedom, and qualitative difference of each [citizen] in the manner of the novel."³⁷

On the other hand, however, Nussbaum contends in this most recent work that a politics of humanity rests on cultivating similarity between oneself and the disgusting other. For example, and with respect to sexual-orientation politics specifically, she says, "Before we can attain a politics of respect in matters of sexual orientation, people have to be able to imagine what gays and lesbians are pursuing, and see it as relevantly similar to their own search for personal and sexual integrity and expression" (p. 48). Indeed, imagination, Nussbaum observes, is what allowed the Supreme Court in *Loving v. Virginia* "to see the similarity of the aims of Mildred Jeter and Richard Loving to the aims of people who seek to marry within their race" (p. 49). Later on in *From Disgust to Humanity*, Nussbaum once again casts humanity politics within the language of similarity: "The politics of humanity asks us to stop viewing same-sex marriage as a source of taint or defilement to traditional marriage, but, instead, to understand the human purposes of those who seek marriage and the similarity of what they seek to that which straight people seek" (p. 164). Under this view, if I can slip into the shoes of the disgusting other for a moment, I might realize that she is not so different from me—and, consequently, not so disgusting—after all.

Admittedly, Nussbaum appears here to advocate only a weak form of humanity-through-similarity. For instance, she never says that to move past disgust we must place ourselves in the shoes of the disgusting other and realize that our goals and aspirations are exactly the same as his. Rather, she is

34. NUSSBAUM, *POETIC JUSTICE*, *supra* note 11, at 28. To be sure, in *Poetic Justice* Nussbaum also elucidates the power of the novel to "recognize[] human needs that transcend boundaries of time, place, class, religion, and ethnicity." *Id.* at 45.

35. *Id.* at 32.

36. *Id.* at 45.

37. *Id.* at 44.

careful to qualify the redemptive power of similarity by stating that a politics of humanity exercises imagination in an effort to see how someone else's life is "relevantly similar," not exactly similar, to one's own (p. 48). In this sense, Nussbaum's theory simply reformulates what constitutional equality guarantees already demand: that all laws treat persons who are similarly situated *in relevant ways, not in every way, the same*.³⁸ In other words, complete identicalness is not a necessary condition for either Nussbaum's theory or constitutional equality guarantees to apply in any given situation.

II. MARRIAGE-EQUALITY ADVOCACY AND SIMILARITY POLITICS

The problem with even the weak form of humanity-through-similarity that *From Disgust to Humanity* appears to embrace, however, is that it tends to steer us away from the "*deep respect* for qualitative difference" that Nussbaum has elsewhere embraced as an integral "part of the idea of [human] flourishing."³⁹ Moreover, weak forms of similarity politics can easily cede to strong forms of similarity politics and to arguments that demand that individuals be treated the same because they are, in fact, the same—arguments that do not necessarily require us to exercise our imagination in ways that are all that imaginative. While a strong form of Nussbaumian similarity might get us past disgust and closer to humanity—and even that is debatable—it does not necessarily accomplish this objective in ways that are either normatively or descriptively desirable. Marriage-equality advocacy, which has embraced a strong form of similarity politics, offers a good case in point. Section II.A will briefly summarize marriage equality's similarity politics. Section II.B will then critique similarity politics generally from both a descriptive and a normative perspective.

A. Marriage Equality's Similarity Politics

Legal advocacy for marriage equality has overwhelmingly relied on a litigation strategy that posits that the state violates constitutional liberty and equality norms when it denies same-sex couples the right to marry because those couples are similarly situated in nearly every respect to their cross-sex counterparts. Professor Marc Spindelman refers to this line of argumentation as "[l]ike-[s]traight" reasoning, which he defines as the claim that "[l]esbians and gay men are just like heterosexuals" and so must be given "the same rights and privileges heterosexuals receive."⁴⁰ "Seductively sim-

38. See *Varnum v. Brien*, 763 N.W.2d 862, 882–83 (Iowa 2009) ("[T]he similarly situated requirement cannot possibly be interpreted to require plaintiffs to be identical in every way to people treated more favorably by the law.").

39. NUSSBAUM, *POETIC JUSTICE*, *supra* note 11, at 45 (emphasis added).

40. Spindelman, *supra* note 18, at 1365.

ple,”⁴¹ like-straight reasoning not only posits that gays and straights are (virtually) the same, but also “reinforc[es] the abstract logic that to be equal one must be the same.”⁴²

While like-straight reasoning shaped some of the arguments that gay rights advocates made to the U.S. Supreme Court in *Lawrence v. Texas*,⁴³ it has played a considerable role in marriage-equality advocacy. In fact, it would not be an overstatement to say that a politics of similarity has driven most of the logic on which equality and liberty arguments in favor of marriage for same-sex couples rest. For instance, in response to the traditionalist marriage claim that same-sex couples can be denied the right to marry because same-sex marriage is a suboptimal environment in which to have and raise children, gay advocates have argued that “children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents”⁴⁴ and that “[n]umerous studies of children raised by gay and lesbian parents conducted over the past 25 years . . . show that children raised by lesbian and gay parents are as successful as children raised by heterosexual parents.”⁴⁵ While like-straight reasoning sometimes underlies claims regarding the similarity between same-sex and cross-sex relationships—including the claim that “lesbian and gay couples often have stable, committed, enduring relationships that play the same central role in their lives as they do for heterosexuals”⁴⁶—it most often centers on the similarity between gay and straight parenting.

The deployment of like-straight reasoning in marriage-equality advocacy makes sense for at least two reasons, one doctrinal and the other strategic. Doctrinally, like-straight reasoning simply reflects the formal equality principle on which federal and state constitutional equality guarantees rest. According to that principle and its antecedent philosophical tradition, similarly situated individuals, and like cases, must be treated alike; to do otherwise would be to violate the federal and state constitutions. Opponents of marriage rights for same-sex couples understand this as well as their marriage-equality counterparts and have tried to convince courts that those couples are dissimilarly situated from cross-sex couples in all sorts of ways. As some of the former have argued in marriage litigation, “[T]he plaintiffs are not similarly situated to opposite-sex couples so as to necessitate further equal protection analysis because the plaintiffs cannot ‘procreate naturally.’”⁴⁷

41. Marc Spindelman, Op-Ed, *Sodomy Politics in Lawrence v. Texas*, JURIST, June 12, 2003, <http://jurist.law.pitt.edu/forum/forumnew115.php>.

42. *Id.*

43. *Id.*

44. Final Reply Brief of Plaintiffs-Appellees at 40, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (No. 07-1499).

45. *Id.* at 40 n.33.

46. Appellees/Cross-Appellants’ Supplemental Abstract and Brief at 429, *Dep’t of Human Servs. v. Howard*, 238 S.W.3d 1 (Ark. 2006) (No. 05-814).

47. *Varnum*, 763 N.W.2d at 882 (summarizing the state’s argument).

Strategically, like-straight reasoning has proven enormously successful with those courts that have struck down exclusionary marriage laws on state constitutional grounds. For instance, Spindelman explains that “[l]ike-straight’ reasoning drives [Chief Justice] Marshall’s *Goodridge* opinion start to end,” as the majority there champions “a definition of marriage that has built into it the idea that lesbians and gay men, hence their relations, are just like heterosexuals, and theirs.”⁴⁸ More recently, like-straight reasoning permeated the Iowa Supreme Court’s unanimous decision in *Varnum v. Brien*. The court there framed its opinion by positioning gay Iowans in a position of “like” relative to straight Iowans, noting that “[l]ike most Iowans, gay and lesbian people are responsible, caring, and productive individuals. . . . Like many Iowans, some have children and others hope to have children. . . . Like all Iowans, they prize their liberties”⁴⁹ It continues this like-straight theme for the remainder of its opinion, observing that “[l]esbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for children”⁵⁰ and that “[m]any leading organizations . . . supported the conclusion that gay and lesbian parents are as effective as heterosexual parents in raising children.”⁵¹

Varnum’s persistent reminders of the similarities between the sexual majority and the sexual minority represent Nussbaum’s politics of similarity writ large. Its claim that “for purposes of Iowa’s marriage laws . . . plaintiffs are similarly situated in every important respect [to heterosexual couples], but for their sexual orientation,”⁵² recalls—albeit in more extreme form—Nussbaum’s observation in *From Disgust to Humanity* that “[t]he politics of humanity asks us to stop viewing same-sex marriage as a source of taint or defilement . . . but, instead, to understand the human purposes of those who seek marriage and the similarity of what they seek to that which straight people seek” (p. 123). Indeed, Nussbaum’s emphasis in her book on the “relevantly similar” becomes in *Varnum* a near insistence upon the “completely similar but for sexuality preference.” In heightened Nussbaumian terms, the *Varnum* justices attempt to establish “empathy or commonality” (p. 102) with gays and lesbians by imagining their experiences—and by seeing an image of themselves in it.

B. Critiquing Similarity Politics

Simply because like-straight reasoning, or a strong version of Nussbaumian similarity, makes sense on both a doctrinal and a strategic level does not mean that it is something that advocates and their supporters should uncritically embrace. Nussbaum maintains that a politics of human-

48. Spindelman, *supra* note 18, at 1366–67.

49. *Varnum*, 763 N.W.2d at 872.

50. *Id.* at 874.

51. *Id.*

52. *Id.* at 883–84.

ity is predicated “on equal respect and on an attempt to move beyond stereotypes to an honest confrontation with the real lives of the group and its members” (p. 123). The strong version of Nussbaumian similarity at play in marriage-equality discourse, however, arguably does neither of those things. Instead, the repeated emphasis on similarity all too easily shades into assimilation to a cross-sex or heterosexual norm that does not accurately capture the reality—or “real lives”—of the same-sex couples seeking to marry. While sexual minorities and same-sex couples might achieve “equal respect” at least some of the time in marriage-equality litigation, it often comes at the price of downplaying the perceptible differences that do exist between those individuals and their straight/cross-sex counterparts. However successful as a litigation strategy, equalizing difference in this way in order to achieve legal equality is neither descriptively accurate nor normatively desirable. Similarity politics might very well yield positive legal gains for sexual minorities. Nevertheless, it is associated with certain costs that demand a closer look.

1. *Similarity Politics Is Descriptively Inaccurate*

Similarity politics is descriptively inaccurate because it deemphasizes, if not altogether overlooks, the documented differences that exist between gay and straight relationships as well as between gay and straight parenting. Take, for instance, the wealth of literature that exists on the differences between gay and straight relationships. Relying on longitudinal observational studies, researchers have shown that gay and lesbian relationships are not just “fundamentally different from heterosexual relationships,”⁵³ but also healthier than them in many key respects. Compared to heterosexual couples, for instance, gay or lesbian couples tend to be “more upbeat in the face of conflict,” using “more affection and humor when they bring up a disagreement.”⁵⁴ Some commentators even note that same-sex couples’ relative egalitarianism is something that “straight couples may have a lot to learn from.”⁵⁵

In addition, gay and lesbian couples tend to divide and distribute household and child care labor differently than do their straight counterparts. One study reports that “being in a same-sex relationship is more important in

53. John Mordechai Gottman & Robert Wayne Levenson, *Observing Gay, Lesbian and Heterosexual Couples’ Relationships: Mathematical Modeling on Conflict Interaction*, 45 J. HOMOSEXUALITY 65, 80 (2003). For a summary of this literature, see Courtney Megan Cahill, *Celebrating the Differences That Could Make a Difference: United States v. Virginia and a New Vision of Sexual Equality*, 70 OHIO ST. L.J. 943, 974–77 (2009).

54. *Gay and Lesbian Couples Research: A case of similarities of same-sex and cross-sex couples, differences between gay and lesbian couples*, THE GOTTMAN RELATIONSHIP INSTITUTE, http://www.gottman.com/SubPage.aspx?spdt_id=2&sp_id=100842&spt_id=1 (summarizing the findings from the *Journal of Homosexuality*’s observational studies).

55. *Id.*

equalizing housework than is having similar incomes.”⁵⁶ Whereas recent empirical work on opposite-sex households has shown that those households always divide labor unevenly between men and women—with women performing the bulk of home and childcare labor even when they are the breadwinners⁵⁷—other work on same-sex couples has shown that they are “more egalitarian than heterosexual couples regarding the household tasks.”⁵⁸ As with same-sex relationship management, same-sex home management could, according to some, have a salutary effect on opposite-sex home management. In one commentator’s words, “[S]ame-sex couples are a model for ways of equalizing the division of housework.”⁵⁹

Consider also some pro-gay commentators’ interest in surveying the differences between gay and straight parenting. In 2001, sociologists Judith Stacey and Timothy Biblarz published what was then a rather controversial study that challenged the “‘no differences’ doctrine” that had come to dominate comparative research on lesbian and gay parenting.⁶⁰ While previous pro-gay research had largely taken a defensive stance on the so-called differences between gay and straight parenting because it aimed to debunk the conservative myth that gays were inferior parents,⁶¹ Stacey and Biblarz contended that it went too far by overlooking all differences and thereby “forfeit[ing] a unique opportunity to take full advantage of the ‘natural laboratory’ that the advent of lesbigay-parent families provided for exploring the effects and acquisition of gender and sexual identity, ideology, and behavior.”⁶² Reinterpreting the results of prior empirical work, Stacey and Biblarz showed that differences between lesbian or gay and straight parenting existed in three key areas: gender, sexuality, and parenting practices.⁶³ They concluded that, if anything, the differences between gay and straight parenting “favor the children with” gay and lesbian parents.⁶⁴

Since Stacey and Biblarz’s landmark meta-study was published in 2001, a number of other studies have similarly challenged the so-called no-differences doctrine that shaped—and often hampered—comparative research on gay parenting for years. Most recently, Abbie Goldberg has

56. Sondra E. Solomon et al., *Money, Housework, Sex, and Conflict: Same-Sex Couples in Civil Unions, Those Not in Civil Unions, and Heterosexual Married Siblings*, 52 SEX ROLES 561, 572 (2005). For a summary of this literature, see Cahill, *supra* note 53, at 969–79.

57. Lisa Belkin, *When Mom and Dad Share All*, N.Y. TIMES, June 15, 2008, § MM (Magazine), at 44 (summarizing these studies).

58. Mally Shechory & Riva Ziv, *Relationships between Gender Role Attitudes, Role Division, and Perception of Equity among Heterosexual, Gay and Lesbian Couples*, 56 SEX ROLES 629, 635 (2007).

59. Solomon et al., *supra* note 56, at 572.

60. Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 163 (2001).

61. *Id.* at 162.

62. *Id.* at 162–63.

63. *See id.* at 167.

64. *Id.* at 177.

underscored the importance of recognizing how growing up with lesbian or gay parents does make a difference in positive ways for the children involved. Noting that “[f]rom a social constructivist perspective, it is difficult to believe that having sexual minority parents would fail to have any impact on individuals’ perceptions of themselves, their relationships, and the world that they live in,”⁶⁵ Goldberg, like Stacey and Biblarz before her, highlights significant differences between gay and straight parenting. She identifies differences along such axes as sexuality and gender, understanding and toleration of differences, and conceptions of family and community⁶⁶—differences which, far from operating as deficits, benefit the children of gay parents.

Because marriage-equality advocacy is so tethered to a robust politics of similarity, it downplays those differences between gay and straight intimate and family life—differences that a *New York Times* columnist recently called “enlightening.”⁶⁷ This is not at all to suggest that gays, the relationships into which they enter, and the families that they raise are not similar in all the “relevant” ways—to partially quote Nussbaum—that matter to courts hearing constitutional challenges to exclusionary marriage laws (p. 48). It is, though, to suggest that the strong form of Nussbaumian similarity currently at play in marriage-equality litigation (and jurisprudence) underrepresents, sometimes profoundly, the “real lives of the group and its members” under consideration (p. 123).

2. Similarity Politics Is Normatively Undesirable

Both within and beyond the marriage-equality context, strong forms of Nussbaumian similarity—and perhaps even a theory of acceptance predicated on similarity—are normatively undesirable for a number of related reasons. First, similarity politics is conservative in a way that progressive critics find objectionable. For instance, Paula Ettelbrick, one of the first progressive critics of the marriage-equality movement, wrote over twenty years ago that “[t]he thought of emphasizing our sameness to married heterosexuals in order to obtain this ‘right’ terrifies me. . . . It robs me of the opportunity to make a difference.”⁶⁸ Other progressive critics have echoed these sentiments, observing that neoliberal marriage rhetoric tends to project an image of marriage that simply (and unabashedly) “replicates the

65. ABBIE E. GOLDBERG, *LESBIAN AND GAY PARENTS AND THEIR CHILDREN: RESEARCH ON THE LIFE CYCLE* 164 (2010).

66. *See id.* at 130–41, 164–68.

67. Lisa Belkin, *What's Good for the Kids*, N.Y. TIMES, Nov. 8, 2009, § 6 (Magazine), at 9, 11.

68. Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, 1989 OUT/LOOK 9.

heterosexual one.”⁶⁹ Under this view, one should not have to sacrifice difference in order to be viewed by others as civilized human subjects.⁷⁰

A politics of similarity, or one of humanity-through-similarity, arguably pushes marriage-equality advocates to turn to like-straight reasoning even more than they already do. After all, the more that gays look like straights, the more likely it is that those straights who are unsympathetic to the idea of same-sex marriage might be able to empathize with those seeking to enter into that institution, and eventually come around to supporting it. In this sense, like-straight advocacy and Nussbaumian humanity-through-similarity work hand in hand, the latter setting the conditions that allow the former to flourish.

Second, similarity politics might be viewed as a form of “covering,” defined by Kenji Yoshino as the rendering of one’s identity less obtrusive.⁷¹ Yoshino in fact conceptualizes same-sex marriage, at least in part, as a kind of covering, insofar “as marriage has historically been associated with straight culture” and “revile[d]” by queers “as an act of assimilation.”⁷² Queers who object to marriage as a form of covering might be more accepting of that institution for same-sex couples if the progressive arguments made in favor of it did not rest as much as they do on like-straight reasoning and on the assimilative logic of similarity that they presume.

Third, a politics of similarity does not necessarily “impel courts to look at difference in life as it is lived.”⁷³ In this sense, a strong form of humanity-through-similarity might simply exacerbate the problems that already beset American antidiscrimination law, which, Yoshino observes, “too often conflates equality with studious nonperception of difference.”⁷⁴ While Nussbaum herself recognizes in *From Disgust to Humanity* the importance of confronting “the real lives of the group and its members” (p. 123), she also articulates a theory for moving past disgust that tends to equate equality with, if not “nonperception,” at least the downplaying of difference.

Fourth, similarity politics, and particularly the strong form of it that is currently taking shape in the marriage-equality context, might simply be a kinder, gentler way of regulating the very disgust whose aim it is to transcend. In this sense, humanity-through-similarity might share some of the less reliable and more suspect characteristics of tolerance discourse. Speaking to tolerance’s less savory side, Wendy Brown has written that “[d]espite its pacific demeanor, tolerance is an internally inharmonious term, blending

69. Suzanna Danuta Walters, *Wedding bells and baby carriages: Heterosexuals imagine gay families, gay families imagine themselves*, in *THE USES OF NARRATIVE* 48, 54 (Molly Andrews et al. eds., 2004).

70. Marc Spindelman lodges an additional criticism against similarity politics when he argues that like-straight reasoning renders invisible the “current realities” of domestic violence within the straight and gay communities alike. See Spindelman, *Sodomy Politics*, *supra* note 41.

71. KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 18 (2006).

72. *Id.* at 91.

73. *Id.* at 182.

74. *Id.*

together goodness, capaciousness, and conciliation with discomfort, judgment, and aversion. Like patience, tolerance is necessitated by something one would prefer did not exist.”⁷⁵ Rather than bringing us closer to a repugnant other, tolerance, Brown argues, “reduce[s] public engagement with difference.”⁷⁶ In the process, it “sacrifice[s] the possibility of developing deep knowledge of others in their ‘difference’ and hence the possibility of substituting such engaged understanding for moralistic distance from or denunciation of difference.”⁷⁷

At first glance, Nussbaum’s advocacy of humanity-through-similarity appears to be the perfect solution to the shortcomings of tolerance. Unlike tolerance, which maintains a place for disgust by marking out subjects as different—in Brown’s words, as “deviant, marginal, or undesirable by virtue of being tolerated”⁷⁸—humanity-through-similarity attempts to transcend disgust by refiguring those subjects as similar to ourselves. In Brown’s view, tolerance is all about “managing the presence of the undesirable, the tasteless, the faulty—even the revolting, repugnant, or vile;”⁷⁹ in short, tolerance represents a way to survive amidst a world of difference and deviance. By contrast, Nussbaumian humanity, far from “a strategy for coping”⁸⁰ with the otherwise disgusting other, represents a way to embrace her as someone who is similar to us, and therefore not so disgusting after all. If tolerance perpetuates difference and thereby contains aversion, then humanity-through-similarity minimizes difference and thereby moves us beyond that untrustworthy (at least for Nussbaum) human emotion.

Upon further reflection, however, one wonders whether overcoming aversion or disgust through the cultivation of empathy and similarity is a morally satisfying response to the problem of disgust—assuming, of course, that one even considers disgust to be a problem in the first place, which Nussbaum surely does. If part of the problem with an ethic of tolerance is the “retreat from a political encounter with difference” that it entails, as well as the “possibility of developing deep knowledge of others in their ‘difference’” that it sacrifices,⁸¹ then arguably humanity-through-similarity is equally problematic. If, however counterintuitively, an ethic of tolerance merely contains or regulates aversion by ultimately failing to appreciate, understand, and embrace difference, then it is not at all clear that humanity-through-similarity offers us a satisfying alternative. Indeed, because it focuses principally on the cultivation of similarity rather than on the recognition of difference, humanity-through-similarity, like tolerance, appears to foreclose the possibility for

75. WENDY BROWN, *REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE* 25 (2006).

76. *Id.* at 88.

77. *Id.*

78. *Id.* at 14.

79. *Id.* at 25.

80. *Id.*

81. *Id.* at 88.

the “deep knowledge of others in their ‘difference’”⁸²—or what Nussbaum has elsewhere described as the “deep respect for qualitative difference”⁸³—that might be a necessary predicate to real acceptance. Put most simply, similarity politics might not be the perfect antidote to the dark side of tolerance after all.

Fifth and finally, similarity politics is not especially imaginative. In *From Disgust to Humanity*, Nussbaum weds together imaginative vision and humanity by invoking the Ciceronian understanding of *humanitas* as “a kind of responsiveness to others that prominently include[s] the ability to imagine their experiences” (p. xviii). Imagining the “real lives” of others, Nussbaum argues, is the vehicle through which the politics of humanity is both expressed and achieved. As she observes in her conclusion, “in the area of sexual orientation . . . the ideas of contamination and defilement are under siege from the forces of imagination and humanity” (p. 205).

If by imagination Nussbaum means the ability to participate in the lives of others by seeing an image of ourselves in them, then one must wonder how imaginative humanity-through-similarity, and particularly the strong version of it at play in marriage-equality discourse, truly is. “[P]art of the idea of flourishing,” Nussbaum maintains in *Poetic Justice*, “is a deep respect for qualitative difference,” something which literary “fancy” is able to achieve.⁸⁴ Literature, under this view, does not necessarily depict the world that we know. Rather, it is something which, in Northrup Frye’s words, “stretches us vertically to the heights and depths of what the human mind can conceive.”⁸⁵

“Qualitative difference” and “stretch[ing] . . . the human mind,” however, play at best a minimal role in *From Disgust to Humanity* (and a nonexistent one in marriage-equality advocacy). Indeed, Nussbaum’s most poignant, if problematic, example of either of those things in the book appears only at its very end, when she discusses Sean Penn’s portrayal of Harvey Milk in Gus Van Sant’s *Milk* (pp. 206–08). “For a straight man to allow a gay man’s mind and sexuality to enter himself,” she contends, “is as decisive a rejection of the politics of disgust as can be imagined” (p. 208). Admittedly, there might be some truth to the claim that humanity and the imaginative vision that facilitates it triumph when a straight man like Penn inhabits the mind and (at least theoretically) the body of an uncloseted gay man like Milk. It is important to keep in mind, however, that Nussbaum’s discussion of Penn’s performance surfaces in the conclusion to a book that is largely dedicated to transcending a politics of disgust through the recognition of similarity rather than through the embrace of difference. Moreover, Penn’s performance was just that—a performance, and an award-winning one at that—and therefore tells us very little about what inhabiting the life

82. *Id.*

83. NUSSBAUM, *POETIC JUSTICE*, *supra* note 11, at 45.

84. *Id.* at 45.

85. FRYE, *supra* note 21, at 101.

of another might mean for the average person. Penn's "exuberant" (p. 208) performance in *Milk* might simply mean that he is a superior actor and not necessarily someone who moved past disgust, either temporarily or permanently, by inhabiting a world foreign to his own.

III. DEEPLY RESPECTING DIFFERENCE

It is well beyond the scope of this Review to imagine what a politics of difference, or one of humanity-through-difference, might look like. Nevertheless, it is worth briefly noting that the Supreme Court's sex equality jurisprudence, or at least part of it, offers an alternative model to the politics of similarity both suggested by Nussbaum and enthusiastically embraced by marriage equality advocacy. In particular, Justice Ginsburg's majority opinion in *United States v. Virginia*⁸⁶ transcends like-straight reasoning and its assimilative logic in a way that could prove fruitful to those interested in moving past similarity politics in the context of sexual orientation and the law. It also provides a useful context in which to consider how to cast arguments in universal ways that are attentive to similarity without sacrificing particularity and the "deep respect for qualitative difference" that Nussbaum has elsewhere championed as an essential part of good governance.

The *Virginia* Court ruled that it was a violation of the Equal Protection Clause to deny women admission into what was then Virginia's only public single-sex institution, the Virginia Military Institute ("VMI").⁸⁷ Writing for the majority, Justice Ginsburg embraced a "distinctive understanding of sex equality,"⁸⁸ one that recognized both that inherent "biological and social differences between men and women" exist⁸⁹ and that "these differences are to be 'celebrat[ed],' not turned into a source of inequality."⁹⁰ In her notable words, "'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity."⁹¹ *Virginia* is "distinctive," to partially quote Cass Sunstein,⁹² because it recognizes the rich differences that do exist between the sexes but at the same time is attentive to the similarities and universals that bind them—in that case, the universal desire on the part of men and women to attend a quality public military institution. It demonstrates that sex equality, the acknowledgement of difference, and progress—recall Ginsburg's remarks in

86. 518 U.S. 515 (1996).

87. *Virginia*, 518 U.S. 515.

88. Cass R. Sunstein, *The Supreme Court 1995 Term: Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 74 (1996).

89. *Id.* at 76.

90. *Id.*

91. *Virginia*, 518 U.S. at 533 (citation omitted).

92. Sunstein, *supra* note 88, at 74.

Virginia regarding the progress narrative that informs constitutional development⁹³—are by no means mutually exclusive ideals.

Curiously, Justice Ginsburg's *Virginia* opinion has played a role in the marriage-equality debate—but mainly on the side of those who oppose marriage for same-sex couples. Citing to *Virginia* and its author's acknowledgement of gender difference, opponents have argued that an institution of both sexes (cross-sex marriage, VMI post-*Virginia*) is better than an institution of just one sex (same-sex marriage, VMI pre-*Virginia*), as even the Court's most devoted advocate of gender equality has recognized (or so the argument goes).⁹⁴ By contrast, with one exception,⁹⁵ marriage-equality advocates have shied away from incorporating *Virginia* into marriage-equality arguments. Perhaps they fear that *Virginia*'s sex equality logic could threaten to upend the like-straight reasoning on which so many of the liberty and equality arguments in favor of marriage equality rest. Indeed, the sheer pervasiveness of that reasoning makes it difficult imagine gay advocates turning to *Virginia* in support of the proposition that gays deserve marriage equality despite the "inherent differences" that exist between them and straights.⁹⁶

Notwithstanding *Virginia*'s relative absence from the marriage-equality project, what might that case bring to it? On the most basic level, *Virginia* is an easy fit: in recognizing the differences between a community of one sex and a community of both sexes—VMI before and after *Virginia*, respectively—*Virginia* already provides the foundation for recognizing those differences between same-sex and cross-sex relationships that sociologists have widely documented and that this Review discussed earlier.⁹⁷ In addition, because *Virginia* challenges "the abstract logic that to be equal one must be the same,"⁹⁸ it paves the way for advocates to argue, for example, that "[j]ust as we celebrate the differences between the genders, so we can recognize and celebrate the different experiences that same-sex and opposite-sex relationships contribute to the . . . tapestry of our community."⁹⁹

Perhaps most important from a sociopolitical perspective, *Virginia* could lead to greater inclusiveness within the gay civil rights movement. It would likely appeal to those progressive critics who have faulted the marriage-equality movement for being decidedly conservative and unapologetically imitative of heterosexual norms and practices.¹⁰⁰ At the very least, *Virginia* offers progressives the opportunity of having a conversation about incorpo-

93. See *supra* note 87 and accompanying text.

94. For a summary of these arguments, see Cahill, *supra* note 53, at 990–94.

95. Brief of Amici Curiae OneIowa et al. at 25, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (No. 07-1499) (citing *Virginia*).

96. *Virginia*, 518 U.S. at 533.

97. See *supra* Section II.B.1.

98. Marc Spindelman, *Sodomy Politics*, *supra* note 41.

99. Brief of Amici Curiae OneIowa et al., *supra* note 95, at 25.

100. See *supra* notes 71–73 and accompanying text.

rating the idea of difference into the arguments on which gay advocates rely in order to secure equal treatment—a conversation that marriage-equality advocacy's strong form of similarity politics has not allowed to flourish, let alone take place at all.

CONCLUSION

Nussbaum is one of the first theorists of disgust to offer not just a critique of it, but also, and importantly, a way to move past it. In many ways, her recommendations with respect to the cultivation of humanity through empathy, identification, and similarity recall Kenji Yoshino's own recent suggestion that in pursuing civil rights, advocates turn away from equality claims "asserted by a subset of the population" in favor of liberty claims "about freedoms we all hold."¹⁰¹ He observes that the Supreme Court, which has "shift[ed] toward a more universal register," is likely more willing to entertain civil rights claims if they are couched in the language of universal "human rights" than if they are cast in the rhetoric of particular identity politics.¹⁰² While surely not an inherently bad thing, couching equality claims in the language of universal desire, as with transcending disgust for the other by noting our similarities to or with her, fails to address the "studious non-perception of difference"¹⁰³ that has unfortunately come to dominate American antidiscrimination law, *United States v. Virginia* notwithstanding. It would seem that the real achievement from an antidiscrimination perspective would be to move *from* disgust *to* humanity, or to achieve gains in civil rights, because of, rather than despite, our differences.

101. YOSHINO, *supra* note 71, at 188.

102. *Id.*

103. *Id.* at 182.

